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No. 95-773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM H. DEAN,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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1. *Bailey* v. *United States*, 116 S. Ct. 501 (1995), unanimously decided December 6, 1995, calls for review or summary reversal of the Fourth Circuit's decision here. The petition was filed shortly before *Bailey* was decided, and pointed out the *Bailey* case as raising similar issues of criminal statutory interpretation. Pet. Cert. 5, 13, 17. The Brief in Opposition, filed several weeks after *Bailey*, chooses to ignore it. *Bailey* and the Fourth Circuit's decision are irreconcilable.

—*Bailey* calls for examination first of the statutory text. 116 S. Ct. at 506. "Aid or assist" in every previous court decision, like "aid or abet," does not mean helping one's self. There is not a single case that suggests it could. This is an axiom of federal criminal law. "Aiding and abetting . . . states a rule of criminal responsibility for acts which *one* assists *another* in performing." *Nye & Nissen* v. *United States*, 336 U.S. 613, 620 (1949) (emphasis supplied). The same is true for federal "aid or assist" statutes. *Gebardi* v. *United States*,

287 U.S. 112, 118-19 (1932); *Morgan* v. *United States*, 159 F.2d 85, 87 (10th Cir. 1947); see Pet. Cert. 5-6.

—*Bailey* calls for considering "not only the bare meaning of the word but also its placement and purpose in the statutory scheme." 116 S. Ct. at 506. The statutory scheme here could not be clearer. The "aid or assist" offense of 26 U.S.C. § 7206(2), first enacted in 1924, was added, in the words of Judge Learned Hand, "to reach the advisers of taxpayers who got up their returns." *United States* v. *Kelley*, 105 F.2d 912, 917 (2d Cir. 1939); *accord*, *United States* v. *Rowlee*, 899 F.2d 1275, 1279 (2d Cir.), *cert. denied*, 498 U.S. 828 (1990); *United States* v. *Borgis*, 182 F.2d 274, 277 (7th Cir. 1950).

—*Bailey* explains that "[t]he meaning of statutory language, plain or not, depends on context." 116 S. Ct. at 506, quoting *Brown* v. *Gardner*, 115 S. Ct. 552, 555 (1994). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Bailey*, 116 S. Ct. at 507, quoting *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Section 7206(1) already punishes taxpayers who file false returns. This Court in *Bailey* cited with approval the dissent in *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting), which admonishes that "courts normally try to read language in different, but related, statutes, so as best to reconcile those statutes, in light of their purposes and of common sense." Unless the Fourth Circuit's new interpretation—that it is now a crime for taxpayers to aid or assist themselves—is reversed, not just "context" but "common sense" will be ignored.

—*Bailey* points out that sometimes "[t]he amendment history . . . casts further light." 116 S. Ct. at 507. The legislative history here could not be plainer. It shows that the sole purpose of adding § 7206(2) in 1924 was to reach persons other than the taxpayer, persons who in some instances would not otherwise be punishable as aiders or abbettors. That was the contemporaneous

understanding, has been the understanding ever since, and until recently had been the Justice Department's understanding as well. See J. KLEIN, FEDERAL INCOME TAXATION 1679 (1929); 1 U.S. DEPARTMENT OF JUSTICE, CRIMINAL TAX MANUAL § 13.04[1] (7th ed. 1994); Pet. Cert. 9-11. Under the government's reading of § 7206(2), which the Fourth Circuit adopted, § 7206(1) is quite superfluous. *But cf. Bailey*, 116 S. Ct. at 507: "Nothing here indicates that Congress, when it provided these two terms, intended that they be understood to be redundant."

The Fourth Circuit's novel construction does not begin to satisfy the requirements for construing a criminal statute that this Court set forth and applied in *Bailey*. The government once again is taking the same unconfined approach to construction of criminal statutes that it urged unsuccessfully in *Bailey*.

2. All that the government finds to say about *Achilli* v. *United States*, 353 U.S. 373, 378-79 (1957)—which contrasted "one who assisted" in violation of the predecessor of § 7206(2), with "one who actually made the return"—is that this Court's explanation of the statute was not the case's holding. Br. Opp. 5 n.5 (typescript filing). It was indeed this Court's dictum—dictum reflecting the same understanding of § 7206(2) that every other court has had until now.

3. The government suggests that "cases involving similar facts are seldom prosecuted under Section 7206(2)." Br. Opp. 7 n.8. That is exactly the point. Such prosecutions have occurred not just *seldom*, but essentially *never*. It was not thought possible. The government has cited not a single previous case of such a prosecution, except for one brought in the Fourth Circuit in 1992, in which the issue was never raised or considered, *United States* v. *Hirschfeld*, 964 F.2d 318 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993), and another involving an unsigned return in which likewise the issue was neither raised nor passed upon. *United States* v. *Greger*, 716 F.2d 1275 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). Both are discussed at Pet. Cert. 11-12.

4. The importance of this case is not just that it creates a new federal crime to be used against taxpayers. What the decision means is that the government now will be able—exactly as it did here—to prosecute taxpayers who file false returns under § 7206(2) instead of § 7206(1), and thereby deny many of them the important home venue protections that Congress specifically enacted in 18 U.S.C. § 3237(b). The government does not attempt to deny, and in the district court it even acknowledged, see Pet. Cert. 7, that that is the real prize at stake here. That is why the government previously trumpeted the Fourth Circuit's decision as "important guidance," a "first," "important to this and other circuits." Pet. Cert. App. 13a-14a. But now the government tells this Court that it did not mean to "suggest that the decision was worthy of review by this Court." Br. Opp. 8 n.8. It has been observed that "The United States is the most frequent, and hence the most calculating, of our litigants." *Stutson* v. *United States*, 64 U.S.L. WEEK 3459, 3464 (1996) (Scalia, J., dissenting).

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted and the case set for argument; alternatively, the judgment should be vacated and the case remanded for the Fourth Circuit to apply the analysis prescribed in *Bailey* v. *United States, supra.*

Respectfully submitted,

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